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No. 04-108

In the Supreme Court of the United States

Susette Kelo, et al.,

Petitioners,

v.

City of New London, Connecticut, et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of Connecticut

BRIEF *AMICI CURIAE* OF DEVELOP DON'T DESTROY (BROOKLYN), INC. AND THE WEST HARLEM BUSINESS GROUP IN SUPPORT OF PETITIONERS

Norman Siegel
Counsel of Record
260 Madison Avenue
New York, New York 10016
(212) 532-7586

Steven Hyman
Richard Farren
McLaughlin and Stern LLP
260 Madison Avenue
New York, New York 10016
(212) 448-1100

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QUESTION PRESENTED

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenues and improve the local economy?

INTEREST OF *AMICI CURIAE*

This *amici curiae* brief is submitted on behalf of two New York City organizations of interested parties who find themselves in a circumstance similar to the circumstances of Petitioners in the above-entitled proceedings.

The first, Develop Don't Destroy (Brooklyn), Inc. ("DDDB"), is a not-for-profit corporation formed on behalf of interested parties in Brooklyn, New York, fighting, inter alia, to protect the property rights of individuals and businesses in a thriving mixed-use community that is being earmarked for demolition in order to accommodate the plans of a private developer. The developer, Forest City Ratner Companies ("FCRC"), has created a project for Prospect Heights, Brooklyn, which envisions a footprint of 24 acres–1.3 times that of the World Trade Center site–and includes a 19,000-seat arena, 17 tower buildings ranging from 210 to 610 feet, 2.1 million square feet of office space (equal to that in the Empire State Building), and 4.5 million square feet of (mostly rental) housing. A key component of this project is the use, or threat of use, of eminent domain to acquire 13 acres of the site, whereby private property will be condemned, seized and transferred by the government to FCRC. Many property owners and long-term business owners have felt compelled to negotiate with FCRC in a disadvantageous environment created by an effective media

campaign that portrays the use of eminent domain as legally inevitable.

The West Harlem Business Group (the "Group") is an unincorporated association of property owners in a 17-acre district of West Harlem in New York City (42 % of which is already owned by Columbia University ("Columbia")) who have been threatened by Columbia with condemnation proceedings if they do not agree to Columbia's price for the acquisition of their land. Columbia has met with governmental officials, but no Memorandum of Understanding has been negotiated between Columbia and any agency having statutory authority to condemn property. Many of the businesses that are members of the Group have a long-term local customer base, so that relocation would cause enormous economic hardships for such businesses far beyond the fair value of the real estate that they could recoup in a condemnation proceeding. Further, there are a few remaining commercial-zoned areas in Manhattan where a commercially competitive replacement property can be occupied.

The situation of the Petitioners in the instant case is similar to those of the property owners in both Prospect Heights and West Harlem. In each case, a question of fundamental constitutional importance is raised: Does the Fifth Amendment limit the power of government to take

property from one private entity and effectively transfer it to another private entity for the stated purpose of stimulating economic development or other perceived more attractive private use that may be veiled under the camouflage netting of "public" purpose? We respectfully submit that the Fifth Amendment proscribes such abuse of the power of eminent domain.

A decision favorable to Petitioners in the case under review would bring greater certainty as to the rights of property owners in similar circumstances. Accordingly, we respectfully urge this Court to reverse the erosion of the rights of property owners and formulate a sufficiently narrow definition of "public use" such that it excludes a purported "economic benefit" theory where the primary economic beneficiaries of a government taking are private parties.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37(3)(a); the requisite consent letters have been filed with the Clerk.[1]

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[1] Pursuant to this Court's Rule 37(6), we note that no part of this brief was authored by counsel for any party, and no person or entity other than DDDB, the Group, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The Connecticut Supreme Court in *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), erroneously disregarded the individual civil right that is coterminous with the right to enjoy one's property when they ruled in favor of Respondents. The lower court's decision marks a further erosion of the "public use" limitation on the condemnation of private property. While this Court's ruling in *Hawaii Hous. Auth v. Midkiff*, 467 U.S. 229 (1984) grants a state or local authority broad powers in condemning land, a taking for the benefit of a private entity, whether profit or not-for-profit, under an "economic development" argument is prohibited by the Fifth Amendment to the United States Constitution.

Accordingly, this Court should correct the Connecticut court's mistaken definition of "public use" and adopt the reasoning of other state supreme courts, which in recent rulings have struck down takings for purely private use.

ARGUMENT

I. The Right to Enjoy One's Property is Tantamount to a Fundamental Civil Right and is Protected by the Fifth Amendment.

The sanctity of an individual's right to acquire and enjoy rights to property is well-established in United States jurisprudence, and, indeed, this Court has defined a right to property as essentially an individual civil right.

> "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. [Citations omitted.] Congress recognized these rights in 1871 when it enacted the predecessor of [42 U.S.C. § 1983]."

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972). In fact, long before the 1871 Act, it was recognized in 1795 that people have "a sense of property" and that private ownership is an "inalienable" human right.

> "[I]t is evident that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and inalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a community in which he could not enjoy the fruits of his honest labour and industry. The preservation of property, then, is a primary object of the social compact."

Patterson, J. in *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 310 (1795).

The Fifth Amendment to the United States Constitution states in part: "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. The Due Process clause of the Fourteenth Amendment states that no "state [shall] deprive any person

of life, liberty or property without due process of law." U.S. Const. amend. XIV § 1. The Due Process clause is interpreted as imposing the same limitation upon the states regarding eminent domain as is found in the case of the federal government. Accordingly, the meaning of "public use" found in the Fifth Amendment also applies to state uses of eminent domain. *See Richardson v. City & County of Honolulu*, 759 F. Supp. 1477 (D. Haw. 1991) (holding that when the power to condemn has been delegated by the state to a municipality, then the applicable parts of the Fifth and Fourteenth Amendments apply). Whatever may be the precise meaning of "due process of law," there can be no question that it does not include the taking of one person's property and giving it to another, either directly or indirectly, solely for his/her private benefit and use, regardless of the perceived "economic benefit" to a political entity or the perceived notion that the proposed use is preferable to the current use. It follows that a taking of property for private use cannot be authorized by Congress without violating the Due Process Clause of the Fifth Amendment to the United States Constitution. Such a taking when authorized by a state is in violation of the Fourteenth Amendment. *See O'Neill v. Leamer*, 239 U.S. 244 (1915). Thus, federal questions are implicated in every eminent domain case arising under the laws of the state in which it is contended that the taking is not for a public use.

II. The Weakened Standard of "Public Use:" *MIDKIFF* and its Progeny.

States and local authorities over the years have failed to take into account the civil rights associated with owning and using one's property and increasingly eroded the term "public use" such that it has come to include a "public benefit" in terms of higher tax revenues and job creation. Most disturbingly, such takings have been effected at the behest of private corporations and developers, who select the property to be taken and derive the principle benefits from the taken land. *See, e.g., Southwestern Illinois Dev. Auth. v. Nat'l City Envtl.*, 768 N.E.2d 1, 4 (Ill. 2002) (hereinafter *SWIDA*).

State supreme courts have upheld the constitutional sufficiency of using eminent domain for economic development based on this Court's ruling in *Midkiff*. *See, e.g., Kelo*, 843 A.2d 500; *Gen. Bldg. Contractors, LLC v. Bd. of Shawnee County Comm'rs of Shawnee County*, 66 P.3d 873 (Kan. 2003); *City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1 (Nev. 2003); *Vitucci v. New York City Sch. Constr. Auth.*, 735 N.Y.S.2d 560 (2d Dep't 2001) leave to appeal denied by 775 N.E.2d 1288 (N.Y. 2002); *City of Jamestown v. Leevers Supermarkets, Inc.*, 552 N.W.2d 365 (N.D. 1996). In *Midkiff*, this Court held that the "public use" requirement of the Fifth Amendment is "coterminous

with the scope of a sovereign's police powers." *Midkiff*, 467 U.S. at 240. The Court further explained that a reviewing court must defer to a governmental exercise of eminent domain authority, so long as the government's "purpose is legitimate and its means are not irrational." *Id.* at 242-43.

As a result of state courts' reliance on *Midkiff* as permitting the use of eminent domain to secure an economic benefit, "public use" has lost its original, true meaning–"use by the public." Traditionally, this meant that to make a use public, the property acquired by eminent domain must actually be used by the public or that the public must have the opportunity to use the property taken. *See West River Bridge Co. v. Dix*, 47 U.S. 507 (1848); *Shasta Power Co. v. Walker*, 149 F. 568 (C.C. N.D. Cal. 1906). "Public use" has instead evolved such that it has been broadly defined to mean something akin to "public advantage." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422-23 (1992).

III. Reining in "Economic Development" as "Public Use."

Nevertheless, legal practitioners have sought to reinvigorate the public use limitation and directly criticized *Midkiff* and its progeny. Ellen Frankel Paul and Richard Epstein both wrote books opposing the direction suggested

by *Midkiff*.[2] Paul has rightly described the ruling in Midkiff as a "constitutional impropriety" regarding eminent domain procedure, effectively neutralizing the public use limitation on government takings.[3] Their solution to limiting *Midkiff* includes a return to substantive due process, a reinvigoration of property rights and judicial protection for the same, and a limiting of public use to the most narrow definition of public use possible.

Other writers have also offered attempts at reinvigorating the "public use" limitation on eminent domain.[4] For example, Martin J. King sees several notable public use decisions as the demise of the public use requirement.[5] King concludes that the law of eminent domain involves two conflicting propositions: "the desire of the consensus to have its demands met versus the rights of the

[2] Ellen Frankel Paul, Property Rights and Eminent Domain (Social and Moral Thought series) (Transaction Books 1988); Richard Epstein, Takings: Private Property and the Power of Eminent Domain (Harvard University Press 1985).

[3] Paul, *supra* note 2, at 99, 102.

[4] *See* Russell A. Brine, *Containing the Effect of Hawaii Housing Authority v. Midkiff on Takings for Private Industry*, 71 Cornell L. Rev. 428 (1986); Thomas J. Coyne, *Hawaii Housing Authority v. Midkiff: A Final Requiem for the Public Use Limitation on Eminent Domain?*, 60 Notre Dame L. Rev. 388 (1985); Mark C. Landry, *The Public Use Requirement in Eminent Domain–A Requiem*, 60 Tul. L. Rev. 419 (1985).

[5] Martin J. King, *Rex Non Potest Peccare??? The Decline and Fall of the Public Use Limitation on Eminent Domain*, 76 Dick. L. Rev. 266 (1972).

individual."[6] The demise of the public use limitation means that these two propositions or goals can no longer be balanced. King proposes to redefine public use. He argues that "use" implies a "user" and that public use implies a public user and therefore the only public user there is, is the government. King's "objective" test for eminent domain requires that the condemned property be taken by the government for functions over which the government will have control and operation.

Thus, there is a sentiment that "public use" should no longer be considered "public benefit" and that it is essential that the entire community should directly participate in any improvement in order that it constitute a public use.

This line of thinking has been followed by the Illinois Supreme Court in *SWIDA*, 768 N.E.2d at 10-11, which held that the taking of property by a governmental authority to be used as a parking lot at a privately-owned automobile racetrack did not constitute a taking for a valid public use and was therefore unconstitutional. The court rejected the argument that the taking would foster economic development, observing that the racetrack could have built a parking garage at higher cost without the taken property. The court found that the condemnation was

[6] *Id.* at 280.

intended to result in the racetrack's private profits and that the "public purpose" concept does not amount to an unfettered ability to exercise the takings for a purely private use.

Ironically, the *Kelo* court, in *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178, 1187-88 (Conn. 2002), held that a redevelopment agency acted unreasonably when it attempted to take as part of a redevelopment project property that was not substandard or essential to the project. The court found that if an owner's property can be integrated into a redevelopment area, the taking of the property is not essential. The court found against the redevelopment agency where the agency failed to consider or discuss the integration of a yacht club's property into the overall development plan.

Hence, there is a growing consensus that eminent domain may not be used to assist private individuals to carry on their business to a better private advantage. This is consistent with the traditional notion of eminent domain which prohibited its use if the sole or primary object was to secure the private interests of some party, even if the community benefits as a result. *New York Hous. Auth. v. Muller*, 1 N.E.2d 153 (N.Y. 1936). For example, in *Georgia Dep't of Transp. v. Jasper County*, 586 S.E.2d 853, 856-57 (S.C. 2003), the court applied a restrictive view of "public use" and held that although the projected economic benefit to a county from a proposed marine terminal was attractive, it

was not a public use that could justify the power of eminent domain. The court noted that the terminal would be financed, managed and operated by a private firm with no general right of public access.

Significantly, in July 2004, the Michigan Supreme Court emphatically overturned *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). *See County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). In *Poletown*, the court held that the public would be the primary beneficiary of the City of Detroit's use of eminent domain to accommodate General Motor Corporation's plan to build a new assembly plant: "the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and ... the law does not so much regard the means as the need." *Poletown*, 304 N.W.2d at 459 (citation omitted). Over twenty years later, the Michigan Supreme Court now has acknowledged that this type of eminent domain simply secured the private advantage of General Motors Corporation. *Hathcock*, 684 N.W.2d at 786-87. The Michigan court's decision marks an important step in the efforts to provide a narrow definition of "public use" and contain the potentially broad application that could threaten property rights, but the three-pronged test suggested by that court still provides potential for abuse by creative public agencies and entities.

IV. Takings Destroy the Fabric of Communities.

A ruling in favor of the Respondents in the instant case would be unwise because it would allow for the use of eminent domain to assist private industry and supplant the market. Such a decision would give a private transferee unjust enrichment at the expense of the condemnee, and it would infringe the rights of the latter. As DDDB and the Group are focused on the effects eminent domain has on a community, we also bring to the Court's attention the numerous deleterious consequences the tactics of Respondents would have on communities like Prospect Heights and West Harlem. Social historians have documented how eminent domain has destroyed the entire social fabric of a community.[7]

In a staggering report on the uses and threats of eminent domain for private parties from 1998 to 2002, the Institute for Justice has documented the destruction or removal of: (1) 127 homes in Hurst, Texas for a shopping mall, (2) 150 families in Wyandotte County, Kansas for a racetrack, and (3) 83 homes in Toledo, Ohio for a car manufacturing facility, for example.[8] The author notes that

[7] *See, e.g.*, Armond Cohen, Poletown, Detroit: A Case Study in "Public Use" and Reindustrialization (Lincoln Institute of Land Policy 1972); Herbert J. Gans, The Urban Villagers: Group and Class in the Life of Italian-Americans (Free Press of Glencoe 1962).

[8] Dana Berliner, Public Power, Private Gain 58 (Institute for Justice 2003).

all too often, "City officials are more than willing to sacrifice their own citizens, particularly those of moderate income, for the promise of richer residents and larger retail."[9]

Alarmed by the unchecked destruction of communities, DDDB and the Group strongly urge this Court to rule in favor of Petitioners and formulate a narrow definition of "public use" to the exclusion of "economic benefit." Such a ruling would reinvigorate the Fifth Amendment as a protection against a plutocratic government, something Justice Harlan was acutely aware of: "[A] government, by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was, after all, but a despotism." *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 237 (1897) (paraphrasing Justice Miller in *Loan Ass'n v. Topeka*, 87 U.S. 655, 662 (1874)). A ruling against Respondents would send a clear message that the civil rights of property owners may not be compromised by an entirely speculative economic benefit.

[9] *Id.*

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court below and hold that the Fifth Amendment limits the power of a state or local authority to condemn property for the benefit of a private entity where the ostensible purpose is for "economic development."

Respectfully submitted,

Norman Siegel
Counsel of Record
260 Madison Avenue
New York, New York 10016
(212) 532-7586

Steven Hyman
Richard Farren
McLaughlin and Stern LLP
260 Madison Avenue
New York, New York 10016
(212) 448-1100

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